Nos. 14-614, 14-623, 14-634, and 14-694

# In the Supreme Court of the United States

DOUGLAS R.M. NAZARIAN, ET AL., PETITIONERS

*v.*

PPL ENERGYPLUS, LLC, ET AL.

CPV MARYLAND, LLC, PETITIONER

*v.*

PPL ENERGYPLUS, LLC, ET AL.

CPV POWER DEVELOPMENT, INC., ET AL., PETITIONERS

*v.*

PPL ENERGYPLUS, LLC, ET AL.

JOSEPH L. FIORDALISO, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES, ET AL., PETITIONERS

*v.*

PPL ENERGYPLUS, LLC, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND THIRD CIRCUITS*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**


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## QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission's exclusive jurisdiction over rates for the wholesale supply of electricity under the Federal Power Act, 16 U.S.C. 791a *et seq.*, preempts New Jersey and Maryland laws that require electric distribution companies to pay subsidies to state-selected generators that bid into and clear the wholesale electric capacity auction conducted by PJM Interconnection, LLC and, in doing so, distort the wholesale price for electricity.

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# In the Supreme Court of the United States

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND THIRD CIRCUITS*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

### INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for writs of certiorari should be denied.

### STATEMENT

1. a. The electric power system consists of three components: the generation of electricity at power plants and other facilities; the transmission of electricity over long distances on high-voltage lines; and the distribution of electricity to end users by "load-serving entities" on low-voltage lines. Office of Enforcement, Fed. Energy Regulatory Comm'n, *Energy Primer: A Handbook of Energy Market Basics* 47, 57 (July 2015) (*Energy Primer*).[1] Originally "most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems," *New York* v. *FERC*, 535 U.S. 1, 5 (2002), and its sale was regulated only by state agencies. This Court held in 1927, however, that the Commerce Clause bars the States from regulating certain interstate electricity transactions, such as wholesale sales of power (*i.e.*, sales for resale) across state lines. *Id.* at 5-6 (citing *Public Utils. Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927)).

Congress responded to the *Attleboro* decision by enacting the Federal Power Act (FPA or Act), ch. 687,

[1] http://www.ferc.gov/market-oversight/guide/energy-primer.pdf.

Tit. II, 49 Stat. 847 (16 U.S.C. 791a *et seq.*). The FPA authorized the Federal Power Commission, the predecessor to the Federal Energy Regulatory Commission (FERC or Commission), to regulate certain components of the electric-power system. 16 U.S.C. 792; see 42 U.S.C. 7151(b), 7172(a)(1). Section 824(b) of the FPA gives FERC jurisdiction over (i) "the sale of electric energy at wholesale in interstate commerce," and (ii) "the transmission of electric energy in interstate commerce." 16 U.S.C. 824(b)(1).

Sections 824d and 824e in turn set forth FERC's core regulatory duties. First, those sections provide that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with" interstate transmissions or wholesale sales, and "all rules and regulations affecting or pertaining to such rates or charges," shall be "just and reasonable." 16 U.S.C. 824d(a); see 16 U.S.C. 824d(b), 824e(a). Second, if FERC finds that "any rate, charge, or classification," or "any rule, regulation, practice, or contract affecting such rate, charge, or classification," is "unjust, unreasonable, unduly discriminatory or preferential," FERC shall determine and prescribe what is just and reasonable. 16 U.S.C. 824e(a).

The FPA also establishes specific limits on FERC's authority that preserve exclusive state jurisdiction over certain matters. With respect to sales, Section 824(b) provides that, apart from the sales specifically identified in the FPA, the statute "shall not apply to any other sale of electric energy." 16 U.S.C. 824(b)(1). For that reason, FERC lacks jurisdiction to regulate retail sales (*i.e.*, sales to users of electricity), which have long been regulated by state utility commissions. *New York*, 535 U.S. at 16-17, 23. Section 824(b) fur-

ther provides that FERC "shall not have jurisdiction * * * over facilities used for the generation of electric energy[,] or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. 824(b)(1). Such facilities are likewise subject to state regulation. See *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205-206 (1983).

In the past two decades, FERC has sought to "break down regulatory and economic barriers that hinder a free market in wholesale electricity" and to "promote competition in those areas of the industry amenable to competition." *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008) (*Morgan Stanley*). Rather than ensuring the justness and reasonableness of wholesale transactions by directly approving or setting rates, the Commission has sought to achieve its regulatory aims through market mechanisms. See *Connecticut Dep't of Pub. Util. Control* v. *FERC*, 569 F.3d 477, 482-485 (D.C. Cir. 2009), cert. denied, 558 U.S. 1110 (2010) (*Connecticut*). Under market-based rate setting, generators and load-serving local utilities generally have two methods to buy and sell electricity in wholesale markets. They may enter into private bilateral contracts for electricity, which, if the product of good-faith, arm's length negotiation, are presumed to be just and reasonable. See *Morgan Stanley*, 554 U.S. at 545-546; 14-623 Pet. App. 52a-53a. They may also sell to, and purchase from, a Commission-approved nonprofit "Regional Transmission Organization[]" or "Independent System Operator[]." *Morgan Stanley*, 554 U.S. at 536-537.

"To further pry open the wholesale-electricity market and to reduce technical inefficiencies caused when different utilities operate different portions of the grid independently," FERC issued a rule encouraging transmission-owning utilities to relinquish control of their transmission lines to the wholesale-market operators, which are charged with operating organized wholesale markets in a nondiscriminatory manner. *Morgan Stanley*, 554 U.S. at 536-537. The wholesale-market operators have the responsibilities of "[e]nsur[ing] the reliability of the transmission grid," "[b]alanc[ing] supply and demand instantaneously," and "[p]lan[ning] for transmission expansion on a regional basis." *Energy Primer* 58.

b. PJM Interconnection, LLC (PJM), is a wholesale-market operator that administers a large regional market in the Mid-Atlantic region, which includes New Jersey and Maryland. PJM operates both energy and capacity markets. The capacity market—at issue here—is forward-looking, providing the option to buy and sell capacity to satisfy future demand. See 14-623 Pet. App. 9a; 14-634 Pet. App. 13a. To ensure that sufficient capacity will be available, PJM holds an annual auction for three years in the future. 14-623 Pet. App. 9a. PJM determines how much capacity the region will acquire for the relevant year based on supply offers and a sloped demand curve that considers both reliability needs and price. *Id.* at 9a-10a; *Energy Primer* 96. Generators, as well as utilities that have purchased capacity from generators under long-term bilateral contracts, commit to sell—and PJM commits to purchase—the amount of capacity that is selected in the auction for resale to

load serving entities in three years' time. 14-623 Pet. App. 9a-10a.

PJM accepts bids from lowest to highest until it has the requisite capacity. 14-623 Pet. App. 9a. The highest bid selected becomes the "clearing price." *Id.* at 10a. Any generator or other entity that bids at or below the clearing price "clears" the auction. *Ibid.* Those providers receive the clearing price for their capacity, regardless of their bid price. *Ibid.* PJM's process for determining the appropriate price per unit is known as the Reliability Pricing Model. *Maryland Pub. Serv. Comm'n* v. *FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011) (per curium). The Commission oversees PJM's operation of its organized-capacity market, the terms and conditions of participation in that market, and the wholesale rates produced by that market. *Id.* at 1284-1285 (detailing FERC's approval of PJM's Reliability Pricing Model). A competitive capacity market provides price signals to build new generation capacity where it is needed. See *ibid.*; *Connecticut*, 569 F.3d at 480.

Existing generators and other providers of capacity may bid zero as "pricetakers," meaning they agree to sell at whatever the clearing price may be. 14-623 Pet. App. 64a; 14-634 Pet. App. 68a. New capacity, however, is subject to the "minimum offer price rule," which FERC instituted in 2006. That rule requires new generators in certain circumstances to bid at or above a default price specified by PJM, unless a particular generator can demonstrate that its actual costs are lower than the default price. See 14-634 Pet. App. 65a-68a. The rule seeks to prevent the manipulation of clearing prices by net purchasers of capacity (*i.e.*, entities that purchase more capacity than they sell

into the market) and thus have an incentive to keep capacity prices as low as possible. See *id.* at 66a-67a.

c. These cases concern substantively identical programs in New Jersey and Maryland to develop new generation resources. Both States historically followed a vertical integration model to provide electricity. 14-623 Pet. App. 34a-35a; 14-634 Pet. App. 48a-49a. In 1999, however, New Jersey and Maryland enacted market-based approaches to electric energy supply. 14-623 Pet. App. 11a; 14-634 Pet. App. 14a. The States decoupled entities that generate electricity from those that supply it to end users. *Ibid.* As a result, utilities in New Jersey and Maryland began participating in the PJM markets. *Ibid.* Under New Jersey and Maryland's restructured frameworks, generators sell their capacity to PJM. 14-634 Pet. App. 14a. The load-serving entities—local utilities that sell electricity to consumers—purchase capacity from PJM. *Ibid.* Electric distribution companies then use their power line network to transfer energy from generators to consumers. *Id.* at 14a-15a.

Approximately a decade after adopting their new approach to energy supply, New Jersey and Maryland officials came to the view that PJM's capacity auction was failing to incentivize enough new generation. 14-623 Pet. App. 12a; 14-634 Pet. App. 15a. They regarded the auction's three-year time horizon as inadequate for generators to assess whether additional resources were warranted. 14-623 Pet. App. 91a-92a; 14-634 Pet. App. 15a. In response, both States adopted similar programs to incentivize new natural-gas-fired electric generators. New Jersey's statute—the Long Term Capacity Pilot Program Act (LCAPP)—was enacted in 2011. 14-634 Pet. App. 10a, 15a-16a. The Maryland

Public Service Commission adopted Maryland's final plan—the Generation Order—in 2012. 14-623 Pet. App. 12a.

Both programs compel electric distribution companies to enter into long-term contracts—15 years for New Jersey, 20 years for Maryland—with generators selected by the State. 14-623 Pet. App. 12a; 14-634 Pet. App. 74a. The programs operate as follows: Under the state-mandated contracts, the electric distribution companies must make payments to generators at a specified rate and amount tied to the generators' wholesale sales of capacity, but the electric distribution companies do not actually purchase electricity or capacity from the generators under those contracts. 14-623 Pet. App. 12a-13a; 14-634 Pet. App. 22a-23a. Instead, the generators must bid directly into and clear the PJM capacity auction. 14-623 Pet. App. 12a; 14-634 Pet. App. 22a-23a. If the generator clears, it sells its capacity to PJM. 14-634 Pet. App. 22a-23a. If the auction clearing price is below the price set in the state-mandated contracts between the generator and the electric distribution companies, the electric distribution companies must pay the generator the difference between the clearing price and the contract price, thereby providing long-term guaranteed revenue streams to the state-selected generators. 14-623 Pet. App. 12a; 14-634 Pet. App. 23a. If the auction clearing price is above the contract price, the generators must pay the difference to the electric distribution companies. 14-623 Pet. App. 12a-13a; 14-634 Pet. App. 23a.

d. The enactment of the New Jersey and Maryland programs precipitated a change in PJM's minimum-offer-price rule. The PJM auction's original rule in-

cluded multiple exemptions, including one for offers submitted by state-mandated resources. 14-623 Pet. App. 10a; 14-634 Pet. App. 67a. This would have enabled the new generators selected by New Jersey and Maryland to bid zero in every auction, ensuring that the generators cleared the auction and received the state-guaranteed subsidies. *Ibid.*

In response to a complaint filed by certain power providers operating in the PJM region, the Commission directed PJM to modify its tariff to eliminate the exemption for state-mandated resources. See *PJM*, 135 F.E.R.C. ¶ 61,022, at ¶¶ 1-3, order clarified on reh'g, 137 F.E.R.C. ¶ 61,145 (2011). The Commission found that removal of the exemption was necessary to prevent "subsidized entry supported by one [S]tate's or locality's policies" from "disrupting the competitive price signals that [the auction] is designed to produce." *PJM*, 137 F.E.R.C. ¶ 61,145, at ¶ 3 (2011). The Third Circuit upheld the Commission's order. See *New Jersey Bd. of Pub. Utils.* v. *FERC*, 744 F.3d 74, 79-80 (2014).

2. This brief addresses four certiorari petitions, two that seek review of a decision of the Third Circuit finding New Jersey's program preempted by the FPA (*CPV Power Dev., Inc.* v. *PPL EnergyPlus, LLC*, No. 14-634; *Fiordaliso* v. *PPL EnergyPlus, LLC*, No. 14-694), and two that seek review of a decision of the Fourth Circuit finding Maryland's program preempted by the FPA (*Nazarian* v. *PPL EnergyPlus, LLC*, No. 14-614; *CPV Maryland, LLC* v. *PPL EnergyPlus, LLC*, No. 14-623).

a. Petitioners in the New Jersey cases are the generators selected by the State under the LCAPP, along with the commissioners of the New Jersey

Board of Public Utilities. Respondents are incumbent power plants and electric distribution companies in the PJM region. 14-634 Pet. App. 36a-39a. Respondents filed suit in the District of New Jersey, seeking a declaration that the FPA preempts the LCAPP. *Id.* at 34a-35a. After a bench trial, the district court held that New Jersey's program is preempted by the FPA under both field- and conflict-preemption theories. *Id.* at 34a-111a.

b. The Third Circuit affirmed. 14-634 Pet. App. 1a-30a.[2] The court held that the LCAPP is preempted by the FPA under a field-preemption theory. *Id.* at 19a-28a. The court explained that FERC "has approved PJM's Reliability Pricing Model as the means to set

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[2] Before oral argument, the Third Circuit invited the Attorney General of the United States to file an amicus brief. 13-4330 Order 1. The government took the position that the LCAPP is preempted. See 13-4330 U.S. & FERC Amicus Br. 11-17 (U.S. Br.). The government reasoned that, because a state-selected generator receives a guaranteed supplement, it can submit a below-cost bid to ensure that it clears the capacity auction, and that "state-sponsored uneconomic entry into PJM's capacity auction directly affects (suppresses) the auction's resulting wholesale capacity rate, to the detriment of generation resources in every other PJM state." *Id.* at 13-14. The government concluded that "New Jersey's directive that selected generators bid into and clear PJM's capacity auction directly affects wholesale rates and, to that extent, is a preempted intrusion upon the Commission's exclusive jurisdiction to regulate wholesale rates and practices 'affecting' rates." *Id.* at 14. The government relied as well on the fact that the subsidy provided by the state-mandated supplement "is directly and explicitly tied to the wholesale rate." *Id.* at 16. The government's brief emphasized that its position on preemption was limited to the circumstances of New Jersey's program and that many avenues remain open for States to promote particular generation resources and incentivize generation construction. *Id.* at 17-20.

the interstate wholesale price for electric capacity in the PJM region," *id.* at 20a, and that the LCAPP attempts to regulate the same subject matter by guaranteeing the state-selected generators a multi-year pricing supplement to "raise the prevailing capacity price to an amount of New Jersey's liking," *id.* at 24a. The LCAPP therefore "essentially sets a price for wholesale energy sales for LCAPP generators" and regulates the same field occupied by FERC. *Ibid.* (citation and internal quotation marks omitted). The court declined to address whether the LCAPP is also preempted under a conflict-preemption theory. *Id.* at 28a.

The court of appeals emphasized that its decision was narrow. 14-634 Pet. App. 28a-30a. The court noted that "[w]hen a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid." *Id.* at 29a. The court suggested that various avenues to encourage new generation remain open to the State, including the use of tax-exempt bonding authority, property tax relief, favorable site-lease agreements on public lands, donation of environmentally damaged properties for brownfield development, and relaxing or accelerating permit approvals. *Id.* at 26a & n.4. The court also suggested that New Jersey could "directly subsidize generators so long as the subsidies do not essentially set wholesale prices." *Id.* at 26a n.4.

3. a. Petitioners in the Maryland cases are the generator selected by the State under the Generation Order and the commissioners of the Maryland Public Service Commission. Respondents are incumbent power plants and electric distribution companies. 14-

623 Pet. App. 37a n.4. Respondents filed suit in the District of Maryland, seeking a declaration that the FPA preempts the Generation Order. *Id.* at 37a. After a bench trial, the district court held that Maryland's program is field preempted. *Id.* at 34a-161a.

b. The Fourth Circuit affirmed, 14-623 Pet. App. 1a-25a, concluding that the Generation Order is preempted under both field- and conflict-preemption theories. *Id.* at 17a-25a. The court explained that, by requiring the state-selected generators to bid into and clear the PJM auction—and then providing those generators a fixed payment in addition to what the generator receives from PJM—Maryland "effectively supplant[ed] the rate generated by the auction with an alternative rate preferred by the [S]tate." *Id.* at 17a. The court made clear that "not every state statute that has some indirect effect on wholesale rates is preempted." *Id.* at 21a (citation and internal quotation marks omitted). But it concluded that "the effect of the Generation Order on matters within FERC's exclusive jurisdiction is neither indirect nor incidental." *Ibid.*

The court of appeals further concluded that the Generation Order is preempted due to a conflict with the FERC-approved program. 14-623 Pet. App. 21a-25a. The court explained that the Generation Order "has the potential to seriously distort the PJM auction's price signals," which are intended to incentivize new generation, by "substituting the [S]tate's preferred incentive structure for that approved by FERC." *Id.* at 22a-23a. The court rejected petitioners' argument that the Commission's 2011 revision to the minimum-offer-price rule explicitly accommodated the participation of state-subsidized plants in the

auction. *Id.* at 24a. In the court's view, "[t]he fact that FERC was forced to mitigate the Generation Order's distorting effects * * * tends to confirm rather than refute the existence of a conflict." *Ibid.* The court again emphasized that "not every state regulation that incidentally affects federal markets is preempted," but it concluded that the Generation Order is "a direct and transparent impediment to the functioning of the PJM markets." *Id.* at 24a-25a.

## DISCUSSION

Under the FPA, the Commission has exclusive authority over rates, and practices directly affecting rates, charged or received for or in connection with the wholesale sale of electricity. 16 U.S.C. 824(b), 824d, 824e. The Commission fulfills that role by approving and overseeing competitive market mechanisms such as PJM's capacity auction. The New Jersey and Maryland programs tie guaranteed payments under state law to the wholesale rate under the PJM auction and to the generators' participating in and clearing the PJM auction. State-selected generators can then bid into the auction market at a price that does not accurately reflect their costs, thereby disrupting the auction's price signals that are designed to incentivize new generation. The Third and Fourth Circuits correctly held that those initiatives are preempted. Both courts explicitly limited their preemption holdings to the specific circumstances of the programs at issue and noted non-preempted ways (both economic and non-economic) in which States can support particular forms of generation. The decisions do not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

**A. The LCAPP And The Generation Order Are Preempted**

Where, as here, Congress has not expressly preempted state law, preemption will nevertheless occur where "compliance with both state and federal law is impossible," or where "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California* v. *ARC Am. Corp.*, 490 U.S. 93, 100-101 (1989) (citation omitted). Federal law must also prevail where "the scope of a [federal] statute indicates that Congress intended federal law to occupy a field exclusively." *Kurns* v. *Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1266 (2012) (brackets in original) (quoting *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 287 (1995)). The Court recently explained in *Oneok, Inc.* v. *Learjet, Inc.*, 135 S. Ct. 1591 (2015), that whether state regulation operates within a preempted field under the analogous Natural Gas Act, 15 U.S.C. 717 *et seq.*,[3] may depend on "the target at which the state law aims." 135 S. Ct. at 1599 (emphasis omitted). State regulation thus will be preempted if it is "aimed directly at * * * wholesales for resale." *Id.* at 1600 (emphasis and citation omitted). Under those precedents, the New Jersey and Maryland programs are preempted.

1. Section 824(b) of the FPA grants FERC jurisdiction over "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). One of FERC's core regulatory duties within that grant of

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[3] Because the relevant provisions of the FPA and the Natural Gas Act "are in all material respects substantially identical," this Court "cit[es] interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981) (citation omitted).

exclusive jurisdiction is to ensure that "[a]ll rates and charges" that are "made, demanded, or received by any public utility for or in connection with" wholesale sales, and "all rules and regulations affecting or pertaining to such rates or charges," are "just and reasonable," 16 U.S.C. 824d(a); see 16 U.S.C. 824d(b), 824e(a). Under the market-based rate setting that FERC employs in the wholesale capacity market for electricity, wholesale rates are determined through Commission-approved and regulated regional markets like the one operated by PJM. See *Maryland Pub. Serv. Comm'n* v. *FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011) (per curiam).

a. The New Jersey and Maryland programs are preempted because they directly distort the PJM auction's clearing price in the manner described below. Under both programs, the State conducts its own bidding process to identify generators that will construct facilities for new generation, requires electric distribution companies to enter into contracts that guarantee that the selected generators will receive a set price for their new capacity, and requires the selected generators to bid that capacity into and clear the PJM auction. 14-623 Pet. App. 12a-13a; 14-634 Pet. App. 22a-23a, 74a. The electric distribution companies must pay the difference between the auction clearing price and the price of new generation set through the state programs, but do not actually purchase capacity under those contracts. 14-623 Pet. App. 12a-13a; 14-634 Pet. App. 23a.

The state requirements that the generators receive payments tied to the PJM auction price and participate in and clear the PJM auction can distort the clearing price received by all auction participants.

See *PJM*, 137 F.E.R.C. ¶ 61,145, at ¶ 3 (2011) ("[S]ubsidized entry supported by one [S]tate's or locality's policies" may "disrupt[] the competitive price signals that [the auction] is designed to produce."), petitions denied *sub nom. New Jersey Bd. of Pub. Utils.* v. *FERC*, 744 F.3d 74 (3d Cir. 2014). If a state-supported bid clears the auction market when it would not have done so without the state support, another unsupported bid (which otherwise would have cleared) may not clear. And lower market-clearing prices that result from the state-supported generators' participation affect all participants in the PJM market and suppress the price signals that would otherwise indicate a need for new capacity. 14-623 Pet. App. 65a-68a, 94a.

b. The Maryland petitioners claim (14-614 Pet. 16-18; 14-623 Pet. 29-30) that the Commission's 2011 amendment to the minimum-offer-price rule, which eliminated the exemption for state-sponsored entry into the PJM capacity market, minimizes any price-skewing effects of state-subsidized entry. Petitioners, however, cannot escape the factual findings of the courts below, which credited evidence that the state programs have a price-suppressive effect on the capacity markets—even after the Commission's 2011 amendment to the minimum-offer-price rule. See 14-623 Pet. App. 22a-23a; 14-634 Pet App. 87a-92a, 108a-109a. That is because a state-selected generator can bid the minimum-offer default price—even if the generator's actual costs are higher than the default price—once the generator accounts for the offset to its costs from the state-mandated supplemental payments it receives. That suppression of price signals, which are an important aspect of PJM's Reliability

Pricing Model, could cause other generators in all States throughout the PJM market to become hesitant to expand generation capacity. See *ibid.* Thus, by requiring the selected generators to bid their capacity into and clear the Commission-approved PJM auction, the programs directly interfere with the competitive market mechanisms that the auction uses to set wholesale capacity rates.

2. The Court's recent decision in *Oneok* confirms that the LCAPP and the Generation Order are preempted, because, beyond their direct price-suppressive pressure on the wholesale capacity market, the programs directly target the PJM market mechanism for determining wholesale capacity rates. In *Oneok*, the Court considered whether FERC's jurisdiction over practices affecting wholesale rates for natural gas preempted the application of state antitrust laws to a practice that affected both wholesale and retail rates. 135 S. Ct. at 1599. The Court explained that whether a state regulation falls within the preempted field depends on "the target at which the state law aims." *Ibid.* (emphasis omitted). The Court concluded that, unlike state regulations that are "aimed directly at * * * wholesales for resale," *id.* at 1600 (citation omitted), the plaintiffs' state antitrust claims were not preempted because antitrust laws "are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace," *id.* at 1601.

Unlike the state antitrust claims in *Oneok*, the LCAPP and the Generation Order take direct aim at the PJM capacity market by attempting to implement their own regulatory frameworks for incentivizing new generation as a direct overlay on the PJM auc-

tion. Both programs mandate that state-selected generators receive the amounts set forth in their state-mandated contracts with electric distribution companies, which are directly tied to the generators' sales of capacity into the PJM market. Indeed, the programs grew out of the view expressed by New Jersey and Maryland officials that PJM's wholesale capacity auction was failing to adequately incentivize new generation in the PJM region. 14-623 Pet. App. 12a; 14-634 Pet. App. 15a-16a.

The States' programs are therefore similar to state regulations that the Court has previously found preempted by FERC's exclusive jurisdiction. In *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988), for example, the Court concluded that a Michigan law that sought to regulate securities issued by interstate natural gas companies was preempted because it would have permitted the State to prevent a natural-gas company from raising its equity levels above a certain point, thus "ensur[ing] that the company w[ould] charge only what Michigan consider[ed] to be a 'reasonable rate.'" *Id.* at 308; see *id.* at 296-297, 310. The New Jersey and Maryland programs similarly target the wholesale market by guaranteeing a level of compensation that the state-selected generators will receive based on their wholesale sales of capacity if they clear the PJM auction, thereby distorting the operation of the PJM market.

In *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354 (1988), the Court held that the FPA preempted a state proceeding to determine the reasonableness of FERC-mandated payments for the sale of nuclear power to wholesalers of electricity, which led to higher retail electricity rates. *Id.* at 373-377.

The Court explained that, even where a State acts within the scope of its authority to set retail rates and conduct prudence reviews, "FERC-mandated allocations of power are binding on the States, and States must treat those allocations as fair and reasonable when determining retail rates." *Id.* at 371. Here too, even where the State is invoking its authority to regulate generation facilities, 16 U.S.C. 824(b)(1); see *Pacific Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205-206 (1983), it may not do so in a way that directly undermines the wholesale capacity rates produced by the Commission-approved PJM auction.

Petitioners attempt (14-623 Pet. 22) to characterize the contracts required by the two state programs as bilateral contracts for the sale of capacity at wholesale, which can establish just and reasonable rates that are subject to review by FERC. See *Morgan Stanley Capital Grp., Inc.* v. *Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 545-546 (2008). But the contracts required by the state programs here are not bilateral contracts for the actual purchase and sale of capacity. The programs instead require the generators' promised capacity to be bid into the PJM auction and sold *to PJM* for the clearing price. 14-623 Pet. App. 12a-13a; 14-634 Pet. App. 22a-23a, 100a. The additional payments made to the generators by the electric distribution companies are not to purchase capacity, but rather are mechanisms to guarantee that generators will receive a specified price based on their wholesale sales and thereby subsidize the generators for clearing the auction and selling their capacity to PJM. That arrangement is aimed directly at and distorts the Commission-approved market mechanism

for setting wholesale rates and is preempted for that reason. Contrary to petitioners' assertions (*e.g.*, 14-623 Pet. 22, 30-34; 14-634 Pet. 29-31), the decisions below do not call into question true bilateral contracts for the purchase of capacity or state requirements that utilities enter into such contracts with particular types of generators.

**B. The Decisions Below Are Narrow And Allow States To Incentivize New Generation Of Capacity In A Variety Of Ways**

Petitioners contend (14-614 Pet. 30-31; 14-623 Pet. 30-35; 14-634 Pet. 27-31) that the decisions of the courts of appeals will stifle the States' ability to encourage new generation of clean energy. But both courts went out of their way to emphasize that their preemption decisions were limited to the specific circumstances of the New Jersey and Maryland programs.

1. In finding the New Jersey and Maryland programs preempted, the courts of appeals focused, at least in part, on the States' attempt to "functionally" (14-623 Pet. App. 17a) or "effectively" (14-634 Pet. App. 20a) set the price that state-selected generators receive for wholesale capacity. Taken in isolation, those statements could perhaps suggest an unduly broad rule of preemption—that whenever a State subsidizes or otherwise supports in-state generation, it is in some measure effectively "supplant[ing]" the Commission-approved wholesale-capacity rate determined through the PJM auction. 14-623 Pet. App. 17a; see 14-634 Pet. App. 26a.

Both courts of appeals, however, specifically explained that their preemption holdings were narrow. The Fourth Circuit stressed that "not every state

statute that has some indirect effect on wholesale rates is preempted," but that the effect of the Maryland program "on matters within FERC's exclusive jurisdiction is neither indirect nor incidental." 14-623 Pet. App. 21a (citation and internal quotation marks omitted). The court declined to express an opinion on "other state efforts to encourage new generation, such as direct subsidies or tax rebates, that may or may not differ in important ways from the Maryland initiative." *Ibid.*

The Third Circuit likewise explained that "[w]hen a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid." 14-634 Pet. App. 29a.[4] The court also noted that "states may select the type of generation to be built—wind or solar, gas or coal—and where to build the facility," *ibid.*, and it stressed that New Jersey has other means available to achieve its clean-energy goals, *id.* at 26a. We agree.

Moreover, at the government's urging (U.S. Br. 18-19), the Third Circuit stated that permissible means of advancing those goals may include using the State's tax-exempt bonding authority, offering property tax relief or favorable site-lease agreements, or easing

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[4] In emphasizing the limited nature of its holding, the Third Circuit stated that it would not "endorse the argument that LCAPP has been field preempted because it affects the market clearing price by increasing the supply of electric capacity." 14-634 Pet. App. 29a. The court apparently attributed that argument to the federal government. *Ibid.* (citing U.S. Br. 11-17). As noted above (note 2, *supra*), however, the government argued in its amicus brief that the LCAPP was preempted because of the program's direct intrusion on the Commission-approved PJM auction and its tying of subsidies directly to the auction price.

permit approvals. 14-634 Pet. App. 26a n.4. Permissible state programs might also involve contracts between generators and utilities that are not directly tied to participation in and clearing the PJM auction, a requirement that local utilities purchase a percentage of electricity from a particular generator or renewable resources, or the creation of renewable energy certificates to be independently used by utilities in compliance with state requirements. The decisions below cannot fairly be read to broadly foreclose such state programs that incentivize new generation through economic or non-economic subsidies, provided those incentives do not directly interfere with the Commission-approved market mechanism for determining wholesale capacity rates. See U.S. Br. 9-10.

2. No court has relied upon the Third or Fourth Circuit's decision to find a state program preempted. Indeed, a district court in Connecticut recently rejected a challenge to that State's renewable-energy program, where the challenge was based on the decisions below.

In *Allco Finance Ltd.* v. *Klee*, No. 3:13cv1874, 2014 WL 7004024 (Dec. 10, 2014), appeal pending, No. 15-20 (2d Cir. filed Jan. 5, 2015), the district court considered a Connecticut program that compelled electric distribution companies to enter into bilateral contracts to purchase up to four percent of Connecticut's electricity needs for a term of up to 20 years from in-state, state-selected renewable projects. *Id.* at *1. The court rejected a claim that the program was preempted by FERC's authority over wholesale rates for electricity. *Id.* at *6-*10. The court explained that, unlike the New Jersey and Maryland programs, the Connecticut program was "devoid of any * * *

market-distorting features that encroach [upon] FERC's exclusive jurisdiction over setting wholesale rates." *Id.* at *10. The Connecticut law did not directly distort the wholesale market because Connecticut required the electric distribution companies to purchase renewable energy directly from the selected generators, rather than requiring the generators to sell their capacity to a FERC-approved wholesale market operator through its auction. *Ibid.*

Petitioners thus have not shown that the Third and Fourth Circuit's decisions will prevent States from implementing such renewable-energy programs.

### C. The Decisions Below Do Not Conflict With Any Decision Of Another Court Of Appeals

Both courts of appeals—and all eight federal judges—to have considered the New Jersey and Maryland programs have concluded that the programs are preempted. The lack of any disagreement in the courts of appeals further counsels against review by this Court.

Petitioner Maryland Public Service Commission contends (14-614 Pet. App. 15-16) that the Fourth Circuit's decision conflicts with *Atlantic City Electric Co.* v. *FERC*, 295 F.3d 1 (D.C. Cir. 2002) (*Atlantic City*), which holds that utilities cannot be forced to cede to PJM their ability to change their rates once they allow PJM to use their transmission lines. *Id.* at 10-11. According to petitioner (14-614 Pet. 16), *Atlantic City* "compels the conclusion that PJM's tariff could not displace [the selected generator's] right to set its own rate for wholesale sales, subject to FERC review." The state-selected generators in these cases, however, voluntarily gave up their right to set their own rate for wholesale sales (subject to review by

FERC) when they entered the PJM auction and agreed to receive the clearing price. The decisions below therefore do not conflict with *Atlantic City*.

Petitioner CPV Maryland asserts (14-623 Pet. 21-24) that the Fourth Circuit's decision has blurred the line that divides the respective spheres of authority between the States and the Commission outlined in the D.C. Circuit's decision in *Connecticut Department of Public Utility Control* v. *FERC*, 569 F.3d 477 (2009), cert. denied, 558 U.S. 110 (2010): the Commission approves the procedure for arriving at the estimated amount of capacity that a wholesale-market operator determines is necessary, even though doing so may incentivize construction of more generation facilities, but the States retain the authority to regulate generation facilities. See *id.* at 481-482. That dividing line remains intact. Both courts of appeals expressly recognized that States retain their authority to regulate generation facilities. 14-623 Pet. App. 20a-21a; 14-634 Pet. App. 29a-30a ("The states may select the type of generation to be built—wind or solar, gas or coal—and where to build the facility."). That authority cannot be exercised, however, in a manner that directly interferes with the Commission-approved market mechanism for determining wholesale capacity rates. The lack of any conflict in the lower courts counsels against this Court's review.

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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